

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

AARON ALFORD,

Defendant-Appellant.

UNPUBLISHED

October 28, 2003

No. 240818

Wayne Circuit Court

LC No. 00-012413-01

Before: Fitzgerald, P.J., and Zahra and Fort Hood, JJ.

MEMORANDUM.

Defendant was convicted, following a jury trial, of felonious assault, MCL 750.82, possession of a firearm during the commission of a felony, MCL 750.227b, and assault and battery, MCL 750.81. He was sentenced to one to four years' imprisonment for the felonious assault conviction, five years' imprisonment for the felony-firearm conviction, and thirty days in jail for the assault and battery conviction.¹ Defendant appeals as of right, and we affirm.

Defendant alleges that the trial court erred in refusing to provide a jury instruction on assault as a lesser included offense of felonious assault. We disagree. An assault, a lesser offense of felonious assault, occurs when there is an attempt to commit a battery or an unlawful act that places an individual in reasonable apprehension of experiencing an immediate battery. See *People v Milton*, 257 Mich App 467, 473; 668 NW2d 387 (2003). A battery is a completion of an assault. *Id.* A defendant is entitled to an instruction regarding a necessarily included lesser offense if the charged greater offense requires the jury to find a disputed factual element that is not part of the lesser included offense and a rational view of the evidence would support the lesser instruction. *People v Cornell*, 466 Mich 335, 357, 367; 646 NW2d 127 (2002).

In the present case, the trial court properly denied defendant's request for the assault instruction because a rational view of the evidence did not support the instruction. *Cornell, supra*. The victim of the felonious assault testified that he was defendant's neighbor for thirty years, and the relationship was not acrimonious. After learning of the assault and battery upon

¹ At sentencing, the trial court imposed a sentence of three months probation for the assault and battery conviction. However, the judgment of sentence provides that the assault and battery sentence was thirty days in jail. This disparity is not raised as an issue on appeal.

his daughter by defendant the previous day, the victim went to see defendant at home, where defendant threatened him with a gun. This event was witnessed by two of the victim's family members. To the contrary, defendant's neighbor, a woman he referred to as "mom," testified that she never saw defendant with a gun during the incident. Defendant's brother testified that defendant did not have a gun when with the victim, but was observed with a gun five to ten minutes later. The brother also testified that both men were angry and yelled at each other. Thus, the evidence presented through the defense witnesses did not establish that defendant attempted a battery upon the victim without a gun or that the victim was in fear of a battery. Accordingly, the trial court did not err in refusing to give the simple assault instruction.

Affirmed.

/s/ E. Thomas Fitzgerald

/s/ Brian K. Zahra

/s/ Karen M. Fort Hood